

**GOVERNMENT OF PUERTO RICO
PUBLIC SERVICE REGULATORY BOARD
PUERTO RICO ENERGY BUREAU**

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IN RE: THE IMPLEMENTATION OF THE
PUERTO RICO ELECTRIC POWER
AUTHORITY INTEGRATED RESOURCE
PLAN AND MODIFIED ACTION PLAN

CASE NO.: NEPR-MI-2020-0012

SUBJECT: Motion to Submit Remaining
PPOAs in compliance with the August 15,
2022, Resolution and Order

**MOTION TO SUBMIT REMAINING EXECUTED PPOAS AND BESS CONTRACTS IN
COMPLIANCE WITH THE AUGUST 15, 2022, RESOLUTION AND ORDER**

TO THE HONORABLE PUERTO RICO ENERGY BUREAU:

COMES NOW the Puerto Rico Electric Power Authority (PREPA)¹, through its counsel of record, and respectfully submits and prays as follows:

1. On August 15, 2022, the Energy Bureau of the Public Service Regulatory Board of Puerto Rico (the “Energy Bureau”) entered Resolution and Order (“August 15 Order”) approving the executed PPOAs submitted by PREPA in the August 4 and 13 filings. The Energy Bureau also ordered PREPA to either expedite negotiations of power purchase and operating agreements (“PPOAs”) with the remaining proponent of photovoltaic solar projects and file executed contracts by August 26, 2022, or alternatively to “provide real and concrete justifications as to why the contracts cannot be executed.” As further detailed below, PREPA hereby submits not only the remaining four (4) executed PPOAs but also the first two (2) energy storage service agreements (“ESSAs”) for battery energy storage system (“BESS”) projects included as **Exhibit A** to this

¹ PREPA hereby adopts by reference and reiterates the procedural background and history detailed in the “*Motion to Submit Execution Copies of PPOAs in Compliance with the April 27 and June 13 Orders, Request for Additional Time to Submit Certain PPOAs and Memorandum of Law Requesting Confidential Treatment of PPOAs and Exhibits*” filed on June 30, 2022 (“June 30 Motion”), the “*Amended Motion to Submit Confidential and Redacted Execution Copies of PPOAs*” filed on July 12, 2022 (“July 12 Motion”) and the “*Motion to Submit Additional PPOAs in Compliance with July 8 Resolution and Order*” filed on August 4, 2022 (“August 4 Motion”).

motion.

2. On June 30, 2022, PREPA filed a document titled “*Motion to Submit Execution Copies of PPOAs in Compliance with the April 27 and June 13 Orders, Request for Additional Time to Submit Certain PPOAs and Memorandum of Law Requesting Confidential Treatment of PPOAs and Exhibits*” (“June 30 Motion”). In its June 30 Motion PREPA described the status of the 18 PPOAs for solar PV energy approved by the Energy Bureau in its February 2, 2022, Resolution and Order.

3. On July 5, 2022, the Energy Bureau issued a Resolution and Order through which it granted confidential designation and treatment to Exhibits A, B, C, D, and E attached to the June 30 Motion. Additionally, the Energy Bureau ordered PREPA to show cause, on or before July 8, 2022, as to why the Energy Bureau should not issue an order requiring PREPA to file a redacted (public) version of the execution copies of PPOAs included in Exhibit A of the June 30 Motion. On July 8, 2022, the Energy Bureau issued a Resolution and Order through which it approved nine (9) executed copies of PPOAs for nine (9) solar PV resource projects, totaling 430.1 MW, across Puerto Rico.

4. Thereafter, on August 4, 2022, PREPA filed a “*Motion to Submit Additional PPOAs in Compliance with July Resolution and Order*” (“August 4 Motion”). In the August 4 Motion, PREPA submitted execution copies of PPOAs totaling 109.37 MW. PREPA also informed the Energy Bureau that there were remaining negotiations with two respondents and an associated five projects (totaling 305 MW) for which final executed copies of PPOAs were still under development. The August 4 Motion included submittal of Exhibit A (under seal), containing executed PPOAs for four of the original eighteen (18) approved PPOAs for solar PV resources from the Energy Bureau’s February 2, 2022, Resolution and Order.

5. Finally, on August 13, 2022, PREPA filed a “*Motion to Submit Additional PPOA in Compliance with July 8 Resolution and Order*” (“August 13 Motion”). Through the August 13 Motion, PREPA submitted an execution copy of an additional PPOA for 60 MW and informed the Energy Bureau that negotiations remained ongoing with a respondent for four (4) additional PPOAs for solar PV projects totaling 245 MW and that it needed more time to potentially finalize contract terms for these proposals based primarily on the need for respondents to confirm certain details in the final PPOAs, including an understanding of the effect of interconnection costs, pricing and BESS project impacts on the PPOA.

6. Through the August 15 Order, the Energy Bureau noted the price increases in the PPOAs, specifically acknowledging a roughly \$6/MWh increase compared to the February 2, 2022, values for the most recently submitted projects. The Energy Bureau went on to state that “[f]or the now fourteen (14) approved execution copies of solar PV PPOAs (from the July 5, 2022 and today’s Resolution and Order), for 599.5 MW in total, the average increased cost compared to February 2, 2022 Resolution and Order values including both base product and interconnection cost adjustments is \$4.5/MWh, or \$4.2/MWh on a capacity-weighted basis, less than a 5% increase compared to the February 2, 2022 values.”

7. PREPA hereby informs the Energy Bureau that it has finalized negotiations with the remaining Tranche 1 PPOA proponent and herein submits executed copies of the pending four (4) executed PPOAs for 245 MW of solar projects (120 MW, 80 MW, 25 MW and 20 MW, respectively). This remaining proponent had also proposed two (2) 100 MW BESS projects co-located and operationally integrated (for ITC compliance purposes) with the largest two (2) of these four (4) solar projects. Each pair of co-located solar and BESS projects shared costs and required interconnected contracts and technical solutions, all of which inhibited independent negotiation of

agreements covering the two (2) projects. The proponent also framed the entire set of six (6) projects as a package based on the economies of scale and development and operational synergies available through the development, procurement and construction of the projects within the same time frame. The need to resolve pricing uncertainties and interconnection issues for the entire set of projects contributed to these being the last four (4) PPOAs to be concluded. It also helped the proponent's two (2) ESSAs, of which PREPA herein submits executed copies, to move ahead more quickly than other storage projects.

8. Noting the Energy Bureau's discussion in its prior order as described in paragraph 6 above, PREPA must highlight the material change in pricing under the six (6) agreements submitted with this motion versus what the Energy Bureau has previously seen. The executed versions of the PPOAs for two (2) of the four (4) solar projects reflect a material increase of around 26% from their initially proposed levelized cost of energy ("LCOE") and the other two (2) solar projects reflect an approximately 14% LCOE increase. The executed versions of the ESSAs for the two (2) BESS projects reflect material increases in their levelized cost of storage ("LCOS") as well, but we request that the specifics of BESS pricing remain confidential until PREPA has finalized the remaining six (6) ESSAs for Tranche 1 BESS projects currently under review by LUMA. (LUMA targets November for completion of those interconnection studies, and completion of those ESSAs will occur shortly after.)

9. The proponent attributed the price increases reflected in the executed PPOAs and ESSAs to extraordinary pressures resulting from (i) supply chain interruptions driven by COVID-19 restrictions, (ii) increased shipping costs, (iii) increased commodity and raw material costs, (iv) rising labor costs, (v) restrictions on solar equipment imports from China because of labor concerns, (vi) the threat of tariffs on solar equipment, (vii) the war in Ukraine and (viii) higher financing rates. The

proponent reported that the projects had become commercially nonviable with the pricing it had originally proposed. During the final weeks of negotiation, PREPA and this proponent also discovered a difference in their interpretation of certain technical requirements for the BESS projects, including the Minimum Technical Requirement (MTR) of 85% round trip efficiency at the point of interconnection, which PREPA expects would require installation of additional capacity to remedy, materially impacting the proponent's original pricing.

10. Despite this, PREPA has moved forward with the execution of the agreements accompanying this motion for the following reasons:

a. The six (6) projects, 245 MW of solar and 200 MW of BESS, represent a significant contribution to Puerto Rico's renewable energy and energy storage needs. The proponent has experience in developing and operating generation projects in Puerto Rico and a track record of completing projects it undertakes. Moving these projects forward aligns with the Energy Bureau's stated priorities and goals for procurement of renewable energy and energy storage.

b. The PPOAs individually remain within the price threshold set for the Tranche 1 process by PREPA's Governing Board of approximately \$110 / MWh. The entire 844 MW Tranche 1 portfolio of solar projects also has a capacity-weighted average LCOE of \$108.03 / MWh, well within the approved range and a significant reduction in pure energy cost compared with the cost of energy produced by certain existing generation resources. The ESSAs remain within the range in terms of LCOS offered by the additional six (6) BESS projects approved by the Energy Bureau, and the Energy Bureau has approved projects as part of this RFP process with LCOEs and LCOSs higher than those offered by the solar and BESS resources covered by the agreements submitted with this motion.

c. Given the Energy Bureau's express priorities and the extraordinary

circumstances described in paragraph 9 above, PREPA sought to procure viable renewable generation and energy storage projects and to this end elected not to compel strict adherence to proponents' original bids. All projects that found themselves nonviable were afforded latitude to make some pricing adjustments so that as much capacity moved forward as possible.² The pricing of the projects covered by the PPOAs and ESSAs submitted with this motion remains competitive with the prices offered by the other proponents selected through the Tranche 1 process despite the magnitude of the price increases reflected in these agreements because the proponent of these projects started from a much lower base price proposal than the others. Thus, while the proponent did increase its pricing in all six (6) agreements, materially so in at least four (4) of them, PREPA does not see the result being different in a material way than the result that would have been achieved if the proponent had started from a higher priced original offer and the increased it by a smaller increment to end up at the same point. PREPA believes drawing a line based on the magnitude of the increase, versus the overall pricing level for viable projects, could be viewed as arbitrary and not in the best interest of rate payers under the current circumstances.

11. As stated before, PREPA has not finalized negotiations with the six (6) remaining ESSA's for Tranche 1 BESS projects which are currently under review by LUMA. Accordingly, these projects are still under a deliberative process withing the Tranche 1 RFP and thus the pricing information in the ESSAs for the two (2) BESS projects included with this filing should remain under seal until PREPA has finalized the negotiation for the remaining ESSAs.

12. PREPA submits to the Energy Bureau that the information redacted in the public versions of **Exhibit A** should be maintained confidential not only because it currently affects the

² PREPA based this decision on its understanding of the Energy Bureau's orders and is not endorsing this approach for future tranches. Once successful projects prove development can happen in Puerto Rico and fair market pricing is well understood, PREPA recommends publication of hard price caps and capacity limits upfront in the RFP.

deliberative process of the Tranche 1 RFP given continued negotiations with proponents, but also because there is information that is considered critical energy infrastructure information (“CEII”) that cannot be disclosed to the public. To protect such confidentiality, PREPA has redacted the transmitting utility maps and diagrams schematics from the PPOA’s and requests the Energy Bureau to determine that such information is CEII and thus, confidential and to maintain the public files with the redaction already provided and the unredacted versions under seal.

13. Also, PREPA requests that the pricing information in the BESS ESSA’s be maintained under seal until the negotiations with the BESS proponents is finalized and PREPA submits executed versions of the final ESSA’s.

14. Applicable laws and regulations support the confidentiality request herein made. The documents in possession of a corporation like PREPA are presumed public. However, access to public information is not absolute, and there are various exemptions for access to public information. *Bhatia Gautier v. Gobernador*, 199 D.P.R. 59, 82 (2017) (emphasis added).

These exceptions are:

(1) a law so declares; (2) the communication is protected by one of the evidentiary privileges that the citizens may invoke; (3) revealing the information may injure the fundamental rights of third parties; (4) it deals with the identity of a confidante and (5) it is ‘official information’ under Rule 514 of Evidence, 2009, 32 LPRA Ap. VI (formerly Rule 31 of Evidence 32 LPRA for. Ap. IV). *Colon Cabrera v. Caribbean Petroleum*, supra.

Id. at 83.

15. Article 6.15 of the *Puerto Rico Energy Transformation and RELIEF Act*³ provides that “any person who is required to submit information to the Energy [Bureau] believes that the

³ *Puerto Rico Energy Transformation and RELIEF Act*, Act no. 57 of May 27, 2014, 22 L.P.R.A. §§ 1051-1056 (“Act 57”).

information to be submitted has any confidentiality privilege, such person may request the [Bureau] to treat such information as such[.]” Act 57 at Art. 6.15. “If the Energy [Bureau], after the appropriate evaluation, believes such information should be protected, it shall grant such protection in a manner that least affects the public interest, transparency, and the rights of the parties involved in the administrative procedure in which the allegedly confidential document is submitted.” *Id.* at Art. 6.15(a). If the Energy Bureau determines that the information is confidential, “the information shall be duly safeguarded and delivered exclusively to the personnel of the Energy [Bureau] who needs to know such information under nondisclosure agreements.” *Id.* at Art. 6.15(c). “The Energy [Bureau] shall swiftly act on any privilege and confidentiality claim made by a person subject to its jurisdiction by means of a resolution to such purposes before any allegedly confidential information is disclosed.” *Id.* at Art. 6.15(d).

16. In exercising its powers, the Energy Bureau and PREPA approved Regulation 8815, which has the force of law. *Id.* at Art. 6.3(b); see also Act 83⁴ at Sec. 5 (“The regulations so adopted shall have the force of law once the provisions of Act No. 38-2017, the *Government of Puerto Rico Uniform Administrative Procedure Act*, are complied with.”). Pursuant to Section 4.2 of Regulation 8815, communications between the Energy Bureau and PREPA shall remain confidential while the administrative competitive procurement process is ongoing.

17. Lastly, PREPA adopted the *Regulation for the Program to Administer Documents of the Puerto Rico Electric Power Authority*, No. 6285 (Jan. 10, 2001) (“Regulation 6285”). Pursuant to Regulation 6285, documents, including information on evaluating offers or bids requests, are confidential while the evaluation, adjudication, and award processes are still ongoing. *Id.* at Sec. V, ¶ 13.

⁴ *Puerto Rico Electric Power Authority Act*, Act No. 83 of May 12, 1941, as amended, 22 L.P.R.A §§ 191-240 (“Act 83”).

18. Federal and Puerto Rico laws protect the confidentiality of CEII, the public disclosure of which may pose a security threat in that the information could be useful to a person or group planning an attack on critical infrastructure. *See, e.g.*, 18 C.F.R. § 388.113, as amended by Federal Energy Regulatory Commission (“FERC”) Order No. 683, *Critical Energy Infrastructure Information* (issued September 21, 2006); *USA Patriot Act of 2001*, § 1016, creating the *Critical Infrastructures Protection Act of 2001*, including 42 U.S.C. § 5195c(e) (defining Critical Infrastructure). FERC regulations subject such information to limitations on use and disclosure to “ensure that information deemed CEII stays out of the possession of terrorists.” 18 C.F.R. § 388.113(d)(4). *Off. of People's Counsel v. Pub. Serv. Comm'n.*, 21 A.3d 985, 991, Util. L. Rep. P 27157, 2011 WL 2473405 (D.C. App. 2011).

19. Under the Critical Infrastructures Protection Act of 2001, the term “critical infrastructure” means “systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.” 42 U.S.C. § 5195c(e). In 2006, FERC Order no. 683 amended the regulations for gaining access to CEII and simplified procedures for obtaining access to CEII without increasing the vulnerability of the energy infrastructure and ensuring that access to CEII does not facilitate acts of terrorism.

20. A utility is not required to obtain FERC or other federal government approval to designate information as CEII. For example, information required by FERC’s Annual Transmission Planning and Evaluation Report, Form No. 715 (“FERC No. 715”) is *de facto* considered CEII and is automatically afforded heightened protections. FERC No. 715 requires that any transmitting utility that operates integrated (non-radial) transmission facilities at or above 100 kV must annually submit information including but not limited to: Power Flow Base Cases, Transmitting Utility

Maps and Diagrams, Transmission Planning Reliability Criteria, Transmission Planning Assessment Practices, and Evaluation of Transmission System Performance. Any utility that submits the required transmission information under FERC No. 715 does so with the knowledge that, as stated in the Form's Instructions, FERC "considers the information collected by this report to be CEII and will treat it as such." *See also* 18 C.F.R. § 141.300(d) relating to the Form and CEII.

21. Mainland regulators typically do not require a utility that designates material as CEII to follow any process before the federal government to make or support such a designation, and, further, that the regulator, in its informed discretion, can establish limits on how information that it considers CEII can be accessed.

22. It is respectfully submitted that the transmitting utility maps and diagrams schematics in the PPOA's qualifies as CEII and thus, should remain redacted. Furthermore, it is asserted that the redactions made are the manner that least affects the public interest, transparency, and the rights of the public. *See*, Act 57-2014 at Sec. 6.15(a). Additionally, it is also submitted that the BESS pricing should be maintained under seal given the fact that there are ongoing negotiations related to additional BESS projects that have not finalized.

23. As stated above, the information that has been redacted from the execution copies of PPOAs as well as the BESS pricing in the ESSA's attached as **Exhibit A** is confidential and, thus, under the applicable laws and regulations the BESS pricing redactions that are not CEII should remain confidential until the adjudication and award process of RFP Tranche 1 is final. However, the CEII shall remain under seal even after the finalization of the Tranche 1 process.

WHEREFORE, for the reasons stated above, PREPA respectfully requests that the Energy Bureau **NOTE** PREPA's filing of the additional executed PPOA's and ESSA's in compliance with

the August 15, Order, determine that the redacted execution copy of the CEII in the PPOA and pricing in **Exhibit A** is confidential, enter an order directing the Clerk of the Energy Bureau to maintain the unredacted copy under seal and disclose for public use the redacted copies of **Exhibit A**.

RESPECTFULLY SUBMITTED

In San Juan, Puerto Rico, this 26th day of August 2022.

/s Maralíz Vázquez-Marrero

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CERTIFICATE OF SERVICE

It is hereby certified that, on this same date, I have filed the above motion with the Office of the Clerk of the Energy Bureau using its Electronic Filing System at <https://radicacion.energia.pr.gov/login>, and a courtesy copy of the filing was sent to LUMA through its legal representatives at margarita.mercado@us.dlapiper.com and laura.rozas@us.dlapiper.com.

In San Juan, Puerto Rico, on this 26th day of August 2022.

Exhibit A

08-26-22 Redacted PPOAs Tranche1